Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
QUALCOMM Incorporated
Application
for a Pioneer's Preference

Gen. Docket 90-314, No. PP-68

REPLY COMMENTS OF SPRINT SPECTRUM L.P.

Jonathan M. Chambers
SPRINT SPECTRUM L.P.
Suite M-112
1801 K Street, N.W.
Washington, D.C. 20036
(202) 835-3617

Jonathan D. Blake
Robert A. Long, Jr.
Kurt A. Wimmer
Ernest A. Young

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for
Sprint Spectrum L.P.

March 20, 1997

SUMMARY

The Commission has made Sprint Spectrum L.P. ("Sprint Spectrum") and PrimeCo Personal Communications, L.P. ("PrimeCo") parties to the present proceedings on the ground that, as holders of the A and B block PCS licenses in the Miami Major Trading Area, their rights may be in conflict with the pending pioneer's preference application filed by QUALCOMM Inc. ("QUALCOMM"). It is Sprint Spectrum's position that any attempt to revoke Sprint Spectrum's or PrimeCo's license in order to satisfy QUALCOMM would be unlawful, arbitrary, and capricious. Such conflict between QUALCOMM's rights and those of the incumbent licensees can be avoided, however, and the Commission should make every effort to do so.

First, assuming for the sake of argument that QUALCOMM is entitled to a pioneer's preference at all, it is clear that the Commission has discretion to award QUALCOMM a license other than the A or B block Miami license. Although the Commission's policy has generally been to allow pioneers to select their service areas, nothing in the Commission's rules preclude some other award where the circumstances warrant. And QUALCOMM has indicated that it is willing to accept some award other than a Miami license.

Second, divesting either Sprint Spectrum or PrimeCo of its license in order to accommodate QUALCOMM would be grossly unfair, given the lack of notice to Sprint Spectrum or PrimeCo of any challenge to their licenses and the huge investment -- over and above the $130 million Sprint Spectrum paid for its license -- that has gone into building out

their networks in the Miami MTA. Such a radical step, moreover, would undermine the security of other licensees and imperil the success of future spectrum auctions.

Third, revocation of either Sprint Spectrum's or PrimeCo's license would be unlawful, arbitrary, and capricious. Such an action would be insupportable because QUALCOMM has waived any claim to the Miami licenses; moreover, revocation would violate the terms of the licenses as well as the high expectancy of renewal embodied in PCS licenses.

Fourth, confiscation of Sprint Spectrum's or PrimeCo's license would amount to a breach of contract and/or an unconstitutional taking. Under the Commission's auction policy, licenses are no longer matters of administrative grace; they are the subject of purchase and sale contracts involving hundreds of millions of dollars. And while licenses do not convey ownership of the electromagnetic spectrum, they do embody legally protected interests which the Commission may not take without compensation.

Any attempt to take back a license after a licensee has paid more than one hundred million dollars for it at an auction, and spent additional tens of millions of dollars to provide the licensed service, would send shock waves through the communications community and raise a host of difficult legal issues for the Commission. Fortunately, the Commission can -- and should -- accommodate QUALCOMM without creating any such situation.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
QUALCOMM Incorporated	)	Gen. Docket 90-314,
Application for a	)	No. PP-68
Pioneer's Preference	)	
	)	

REPLY COMMENTS OF
SPRINT SPECTRUM L.P.

I. INTRODUCTION AND BACKGROUND

On January 7, 1997, the D.C. Circuit vacated the Commission's decision not to award a broadband Personal Communications Services ("PCS") pioneer's preference to QUALCOMM, Inc. ("QUALCOMM"), and remanded for further proceedings. Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169 (D.C. Cir. 1997). Because QUALCOMM had originally requested a preference for the "southern Florida area, or whatever region the Commission defines to include Miami and surrounding communities," QUALCOMM Request at 2 (May 4, 1992), the Commission concluded that the remand raises a "possibility of a conflict" between QUALCOMM's application and the rights of the auction winners who ultimately secured the A and B block licenses in the Miami Major Trading Area ("MTA"). See In the Matter of QUALCOMM Inc., Request for Pioneer's Preference, GEN Docket No.

90-314, Order of Feb. 25, 1997, at 1. The Commission thus made Sprint Spectrum L.P. ("Sprint Spectrum") and PrimeCo Personal Communications, L.P. ("PrimeCo") -- the holders of the A and B block licenses, respectively -- parties to this proceeding. Sprint Spectrum accordingly files these comments regarding possible remedies in the event that QUALCOMM is ultimately awarded a preference on remand.[1/]

No necessary conflict exists between the D.C. Circuit's remand order and the licenses held by Sprint Spectrum and PrimeCo. The Court of Appeals held only that the Commission had failed to apply its pioneer preference rules consistently -- not that QUALCOMM was necessarily entitled to a preference on remand. Nor, as QUALCOMM has implicitly acknowledged by suggesting other possible solutions,[2/] do the Commission's rules require that QUALCOMM should receive one of the Miami licenses if the Commission ultimately determines that QUALCOMM is entitled to a preference. In short, the Commission has substantial latitude to avoid the possibility of "conflict" over the Miami licenses.

The Commission should avoid such conflict, both as a matter of policy and of law. It has presided over the most successful spectrum auctions in history, which have not only assured that licenses are awarded to those who value them most highly, but have also garnered billions of dollars for the federal Treasury. To rescind an auctioned license

---

[1/] Sprint Spectrum L.P. and its general partner, Sprint Spectrum Holding Company, L.P., are limited partnerships formed by non-publicly traded subsidiaries of Sprint Corporation, Tele-Communications, Inc., Comcast Corporation, and Cox Communications, Inc.

[2/] See Letter from Veronica M. Ahern, Attorney For QUALCOMM, Inc., to Secretary William F. Caton, Federal Communications Commission, at 3 (March 5, 1997).

where the winning bidder has complied with all FCC rules would send tremors through the communications marketplace and dramatically undermine the confidence necessary to ensure the success of future auctions.

Such an action would also raise a host of legal issues. It would not only violate the terms of the license itself, as well as the Commission's own regulations governing renewal expectancies, but would also breach the contract established by the auction transaction. Confiscation of a license would likewise take protected property interests without just compensation. For all these reasons, Sprint Spectrum urges the Commission at the outset of these proceedings to make clear, consistent with QUALCOMM's suggestion, that any preference which might ultimately be awarded to QUALCOMM will not affect Sprint Spectrum's or PrimeCo's Miami licenses.

II. THE COMMISSION HAS BROAD DISCRETION TO FASHION AN APPROPRIATE REMEDY FOR QUALCOMM.

Beyond noting that the D.C. Circuit's Opinion does not require that QUALCOMM be awarded a preference at all,[3/] Sprint Spectrum has no comment on the merits of QUALCOMM's application. If the Commission were to conclude, however, that QUALCOMM is entitled to a preference, nothing in the D.C. Circuit's Opinion, the Communications Act, or the Commission's regulations requires that it award QUALCOMM the Miami license. While the Commission has stated as a general policy that "[w]e will permit the person receiving a preference to select the one area of licensing that it desires to serve," In the Matter of Establishment of Procedures to Provide a Preference to Applicants

---

[3/] See SEC v. Chenery Corp., 318 U.S. 80 (1943) (Chenery I); SEC v. Chenery Corp., 332 U.S. 194 (1947) (Chenery II).

Proposing an Allocation for New Services, 6 FCC Rcd 3488, 3495, at ¶ 53 (April 9, 1991), reconsideration denied, 7 FCC Rcd 1808, 1812, at ¶ 28 (Feb. 26, 1992), that policy is not made mandatory in the Commission's rules. Rather, the rules provide simply that "[e]ach preference request must contain pertinent information concerning . . . the area for which the preference is sought." 47 C.F.R. § 1.402(a).

It makes sense from the Commission's perspective that pioneer preference applications be evaluated in the concrete factual context of a request to serve a particular area. This may be especially true where the applicant has tested its technology in the particular area.[4/] But this consideration need not be controlling, and depending on the circumstances, it may be entitled to very little weight. Thus, the Commission has never said that its policy of permitting pioneers to select their service area establishes anything more than a presumption that applies if all other factors are equal.[5/] Where other factors have not been equal, the Commission has not hesitated to waive the presumption. In the Commission's proceedings regarding an application by CellularVision for a pioneer's preference for Local Multipoint Distribution Service, the Commission rejected

---

[4/] While the three successful pioneers (APC, Cox, and Omnipoint) tested their technologies in the particular areas for which they applied, Sprint Spectrum is unaware of any tests which Qualcomm may have conducted in the Miami MTA.

[5/] The Commission's treatment of the previously successful pioneers confirms this point. Omnipoint, for example, specified only an area of New Jersey in its preference application; the ultimate award, however, included territory as far north as Vermont. Although an instance of an applicant's getting more than it asked for, Omnipoint's experience makes clear that while an applicant may request certain areas in the application, the ultimate decision lies with the Commission to define the scope of the preference award in such a way as to maximize efficient service for consumers.

CellularVision's request for a license to serve the Los Angeles region on the ground that CellularVision was already providing similar service in New York. See In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 Ghz Frequency Band, 11 FCC Rcd 53, 78-80, at ¶¶ 68-71 (July 28, 1995). The Commission noted that CellularVision's application -- like QUALCOMM's -- was made prior to Congress' grant of competitive bidding authority. "Due to the fact such authority has drastically altered the pioneer's preference rules by requiring payment from pioneers, and due to the unique circumstances [here], we find no further need to consider whether CellularVision is entitled to a preference in Los Angeles." Id. at ¶ 70.

The regulation requiring applicants to specify particular areas, 47 C.F.R. § 1.402, moreover, contemplates that such applications will be granted before other non-pioneer licenses are awarded. In those circumstances, there generally would be no reason to refuse to give the pioneer the area it has requested. Here, by contrast, there are compelling countervailing considerations: auctions have been held, and incumbents who have paid well over $100 million each already hold the licenses originally requested in QUALCOMM's preference application. The Commission has ample authority to adjust its preference policies in order to accommodate this special situation.[6/] As with the introduction of a payment requirement for pioneers following the grant of section authority in 1993, "[t]he Commission legally may modify the rules applicable to applicants and proceedings in which final decisions have not been made. Applying modifications to the

---

[6/] Indeed, the pioneer's preference rule requires an applicant to "address any conflicting licensing rules" in its application, 47 C.F.R. § 1.402(a), strongly indicating that the Commission has authority to accommodate such situations when they arise.

pioneer's preference rules prospectively to pending pioneer's preference requests would not constitute retroactive rulemaking." In the Matter of Review of the Pioneer's Preference Rules, 9 FCC Rcd 605, 611 n.24 (Jan. 28, 1994).[7/] Nothing in the Commission's regulations precludes the Commission from accommodating the rights of all concerned parties by granting a preference in an area not already held by a bona fide purchaser of a license.

More specifically, there is no legal requirement that QUALCOMM be awarded a license for a Major Trading Area ("MTA"), as opposed to a Basic Trading Area ("BTA"). The Commission's original conclusion was that pioneers should receive 30 MHz licenses. Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 1337, 1349 ¶ 80 (Feb. 3, 1994). At that time, the only 30 MHz PCS licenses were MTA-wide. See id. But 30 MHz BTA licenses are now available, and QUALCOMM has indicated that it is willing to accept a BTA license. Such a result would be entirely consistent with the Commission's original policy of focusing on the amount of spectrum awarded, rather than the geographical territory involved.

III. STRIPPING SPRINT SPECTRUM OR PRIMECO OF ITS LICENSE WOULD BE GROSSLY UNFAIR AND DEVASTATING TO THE COMMISSION'S AUCTION POLICY.

Given the amount of discretion available to the Commission, there is no reason for the Commission even to consider stripping Sprint Spectrum or PrimeCo of a license purchased at auction.

[7/] See also Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1477 (D.C. Cir. 1984) (Noting "the 'broad discretion' Congress vested in the Commission 'precisely to facilitate . . . modifications of administrative policies in light of developments' in an evolving industry") (quoting Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1425 (D.C. Cir. 1983)).

A. Sprint Spectrum and PrimeCo are bona fide purchasers for value, and have made massive investments in reliance on their licenses.

To strip either Sprint Spectrum or PrimeCo of its license would be grossly unfair and inequitable. Sprint Spectrum spent $131 million to acquire its A Block license at an auction conducted by the Commission. Since then, Sprint Spectrum has invested scores of millions of dollars to relocate microwave incumbents, to build cell sites and install switches, and to take many other steps necessary to build out its PCS network, as required under the Commission's PCS licensing policy. Sprint Spectrum has entered into long-term contracts and employed dozens of employees in Miami. All of these expenditures and commitments were made in reliance on the government's assurance, manifested in the license itself and the Commission's rules, that Sprint Spectrum would be entitled to retain its Miami license for at least the 10-year license term, with an expectancy of renewal thereafter.

Sprint Spectrum's expenditures were made without any notice that its right to the license was challenged by QUALCOMM or any other party. The Commission has said that "license grants which are challenged by litigation are subject to that litigation and may be undone if the basis of the grant is reversed as a result of the outcome of the litigation," In the Matter of Application of Wireless Co., L.P., 10 FCC Rcd 13233, 13236 (June 23, 1995) (emphasis added). Here -- as we discuss further below -- no party has ever challenged the grant of the A block Miami license to Sprint Spectrum. And although Sprint Spectrum was aware of QUALCOMM's challenge to the denial of its request for a pioneer's preference in the separate proceeding involving that issue, QUALCOMM never asserted any challenge

to the Sprint Spectrum license in the proceedings that led to the grant of that license.[8/] Moreover, given that the pioneer preference rules do not mandate that the pioneer must be given the territory for which it applies, Sprint Spectrum had no reason to assume that its license was at issue in QUALCOMM's appeal.

Loss of the Miami license would have enormous adverse financial consequences for Sprint Spectrum's effort to establish a nationwide "network of networks." Through participation in D and E block auctions, one of Sprint Spectrum's owners has augmented Sprint Spectrum's A and B block holdings so as to achieve nationwide coverage. Sprint PCS Chief Executive Officer Andrew Sukawaty recently observed that

> In the recent Federal Communications Commission auctions, Sprint Corporation won licenses for all areas that were not previously covered by Sprint PCS, giving us licensed coverage of 260 million people. While other wireless service providers are regional operators or use a patchwork of technologies to achieve coverage, we will offer customers a seamless nationwide PCS network using a single technology. Other countries have similar national systems and now Sprint PCS has put the U.S. on the road to one.

Sprint Spectrum Press Release (Mar. 11, 1997). Mature cellular systems offer nationwide coverage through common ownership and contracts. Consequently, Sprint Spectrum's ability to offer nationwide coverage will speed the introduction of new competition into the market for wireless services.

[8/] The Commission's own rules, moreover, did not permit Sprint Spectrum the luxury of awaiting the result of that proceeding before making the investments necessary to meet its build-out requirement. Nor would it have served public policy if they had.

Because Sprint Spectrum purchased the A block license in Miami it did not bid on D or E block licenses in that area. Revocation of the Miami license, therefore, would create a gaping hole in Sprint Spectrum's nationwide coverage. As a result, taking Sprint Spectrum's license now would be far worse than having awarded it to QUALCOMM in the first place.

B. A successful auction policy depends on investor confidence that licenses -- once purchased -- may be retained according to the terms of the license.

The havoc wrought on Sprint Spectrum's business operations as a result of revoking its license would be obvious to other participants in the telecommunications market. Prudent businesses would weigh heavily such a dangerous precedent before participating in any further auctions conducted by the Commission. Indeed, the Commission's own economists have warned that "[i]f spectrum users and their financial supporters are not reasonably certain of the rules that will govern spectrum use, they will be less willing to invest in obtaining and developing the spectrum. . . . In the absence of such certainty, the spectrum may not be used to its full potential and the public may fail to realize its full value." Gregory L. Rosston & Jeffrey S. Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest," 1997 FCC LEXIS 384, at *57.[9/]

Nor would confidence in the Commission's auction process be preserved if Sprint Spectrum were ultimately able to recover its out-of-pocket costs incurred in connection with the Miami license. As explained above, the Miami license is an integral piece in a

---

[9/] While Messrs. Rosston's and Steinberg's comments referred specifically to certainty in the rules that will govern use of the spectrum pursuant to a license, it is obvious that the same point applies even more strongly to certainty that a license in fact means what it says.

nationwide puzzle, the value of which is greater than that of the pieces considered in isolation.[10/] If any license may be revoked, even with compensation, then no service provider can count on assembling and retaining the necessary pieces to construct a "network of networks." Auction prices will accordingly incorporate the risk that any given license will be "bought back" by the Commission, and will discount any added value that might be secured by incorporating individual pieces into a greater whole. Such distortions can only undermine the allocative efficiencies sought to be achieved by the auction process, and reduce the potential recovery for the public fisc.

In sum, without the flexibility to designate where pioneer's preferences will be awarded if they are required after the auction has been conducted and facilities constructed, the Commission would confront a number of pernicious influences. The threat of appeals by disappointed pioneer preference applicants could lead to delays in conducting auctions and therefore expediting new services. It could delay construction by auction winners who fear they would lose their licenses. It could dampen auction bidding. It could motivate operations intended to maximize short-term returns, not long-term base-building. It could encourage strike applications or flimsy appeals which winning applicants might feel the need to buy off as in the "bad old days" of cellular lotteries. In short, the threat of allowing QUALCOMM to claim one of the two Miami MTA licenses would send profound

---

[10/] See also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5544, at ¶ 31 (July 15, 1994) ("We further believe that the values of most broadband PCS licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions").

shock waves through the auction process and could have the perverse effect of preventing licensees from making the most efficient and effective use of the electromagnetic spectrum.

IV. DIVESTING SPRINT SPECTRUM OR PRIMECO OF ITS LICENSE WOULD BE UNLAWFUL, ARBITRARY, AND CAPRICIOUS.

Attempting to divest Sprint Spectrum or PrimeCo of its lawfully-obtained license in Miami would not only be unwise from a policy standpoint -- it would also be unlawful, arbitrary, and capricious for at least three reasons.

A. QUALCOMM has no legal claim to Sprint Spectrum's or PrimeCo's license because it failed to challenge the Commission's award of those licenses.

QUALCOMM never opposed the award of licenses to Sprint Spectrum or PrimeCo. Thus, the licenses were granted without any proceedings at the Commission or appeal in court. Compare, e.g., Ethyl Corp. v. Browner, 67 F.3d 941, 945 (D.C. Cir. 1995) ("nunc pro tunc" relief available where party pursues timely judicial review); Application of Wireless Co., 10 FCC Rcd at 13236 (recognizing that "license grants which are challenged by litigation are subject to that litigation and may be undone if the basis of the grant is reversed as a result of the outcome of the litigation") (emphasis added). Having failed to mount a timely challenge to the Commission's grant of Sprint Spectrum and PrimeCo's licenses, there is no mechanism available under the Communications Act, the Administrative Procedure Act, or any other law to permit QUALCOMM now to attack the grant of those licenses. Compare JEM Broadcasting Co. v. FCC, 22 F.3d 320 (D.C. Cir. 1994) (citing Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959)) (refusing to allow judicial review of an FCC rule after the 60-day period specified

by the Hobbs Act, when there was no claim that the Commission's action was unconstitutional, exceeded its authority, or was premised upon an erroneous interpretation of the Communications Act). QUALCOMM cannot bring itself within the narrow exceptions recognized in Functional Music and JEM.

QUALCOMM retains a claim to a pioneer's preference arising out of its successful appeal. But that is hardly the same thing as a claim to invalidate the class A or B Miami licenses bought and paid for by Sprint Spectrum and PrimeCo. The preference proceeding has always concerned only QUALCOMM's right to some preference, in some market. If QUALCOMM had wished to assert a specific right to the Miami A or B block license, then the time to do that was in the award proceeding. The Commission does not have the authority to award QUALCOMM one of those two licenses when they have been issued without legal challenge.[11/]

B. Revocation of lawfully-awarded licenses under the present circumstances would violate the terms of the licenses.

Section 301 of the Communications Act provides that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301 (emphasis added). Sprint Spectrum's license similarly provides that "[t]his license does not vest in the licensee any right to operate a station nor any right in the use of frequencies beyond the term thereof nor in any other manner than authorized herein." (emphasis added). Both these provisions confirm that the "terms, conditions, and periods of the license" mean what they say: a licensee is guaranteed the right to operate its business

---

[11/] As we explain below, QUALCOMM would not be entitled to a Miami MTA license even if it had challenged the award of licenses to Sprint Spectrum and PrimeCo.

within the terms of the license, for the full term specified.[12/] That, of course, is why businesses pay hundreds of millions of dollars for licenses.

Cancelling Sprint Spectrum's license in order to give it to QUALCOMM would flagrantly violate these terms and conditions. The 10-year term of the license has hardly commenced, and Sprint Spectrum has done nothing to violate the license's terms; indeed, it has magnified its exposure to divestment losses by working to complete the license's build-out requirement. Nothing in the Communications Act gives the Commission power to violate the terms of a license.

C. Revocation of Sprint Spectrum's or PrimeCo's license would violate the policies embodied in the Commission's regulations governing the license renewal expectancy.

In licensing PCS networks, the Commission has emphasized the importance of a "high renewal expectancy" in order to "provide a stable environment that is conducive to investment, and thereby . . . foster the rapid development of PCS." Amendment of the Commission's Rules to Establish New Personal Communications Services, 8 F.C.C. Rcd 7700, 7753, ¶ 130. Under the Commission's rules, a licensee who has provided "substantial service" and who has substantially complied with the Communications Act and the Commission's rules will not be subject to competing applications for renewal of the license. See 47 C.F.R. § 22.940(a)(1), 22.935(c). The Commission's economists have explained that "[t]his policy encourages efficient investment in assets tied to a specific license because license holders retain the benefits of these investments. Without confidence in their long-

---

[12/] Although 47 U.S.C. § 312(a) provides for revocation of licenses under certain circumstances, none of those circumstances is remotely applicable here.

term rights, licensees would tend to underinvest in license-specific assets . . . ." Rosston & Steinberg, supra, at *58. This point is especially compelling in the PCS context, where build-out of a network requires massive initial investment in license-specific assets.

Of course, Sprint Spectrum and PrimeCo each have years to go before their initial license term expires. But the policy behind "high" renewal expectancies in the PCS context is directly applicable here; as Rosston and Steinberg point out, "incumbents do expect that they will be able to continue using spectrum that they have been assigned without additional or unexpected interference, or major new service and technical restrictions." Id. at *59. No such security can exist, however, if the Commission takes back licenses before the initial term even ends, and no prudent business will invest in a PCS network under those circumstances. Any action that so undermines the policy clearly expressed in the Commission's rules is arbitrary and capricious.

D. Section 309(j) of the Communications Act provides no basis for revoking licenses held by Sprint Spectrum or PrimeCo.

Section 309(j), which grants the Commission authority to auction spectrum licenses, certainly does not diminish a licensee's renewal expectancy nor does it provide any other basis for revocation. First, Section 309(j)(6)(D) clarifies that PCS licensees enjoy the same renewal expectancy as cellular providers and other licenseholders. Second, 309(j)(6)(B) provides that the general licensing provisions of Title III (Sections 301, 304, 307 and 310) and Section 706 continue to apply to auctioned licenses. Three of these provisions hold significance for the current proceeding:

(a) Section 307 defines the term of years of a PCS license. As noted above, revocation of Sprint Spectrum's license would violate that provision.

(b) Section 304 stipulates that a license must waive a claim to spectrum and relinquish a license to the federal government provided that the spectrum was previously used by the federal government.[13/]

(c) Section 706, "War Emergency -- Powers of the President," grants the President authority to suspend a license or reclaim a license for use by the government "[u]pon proclamation by the President that there exists war or a threat of war . . . ." 47 U.S.C. § 606(c).

That Congress enumerated these rather limited circumstances when a license can be lawfully revoked where the licensee is complying with FCC rules strongly indicates that revocation for any other grounds is impermissible. Thus, Section 309(j) provides no basis for the Commission to revoke Sprint Spectrum's license.

V. STRIPPING SPRINT SPECTRUM'S OR PRIMECO'S LICENSE WOULD BE A BREACH OF CONTRACT AND AN UNCONSTITUTIONAL TAKING.

While a radio license does not confer "ownership" of the electromagnetic spectrum, see 47 U.S.C. § 301, the sale at an auction and the grant of a license convey rights that are subject to full legal protection.

A. The auction -- at which Sprint Spectrum paid $ 131 million for its license -- created a contract of sale which the Commission would breach by revoking the license.

The PCS auction was a simple transaction: a buyer conveys a sum of money to the government, and in return receives the right (provided certain conditions are met) to

---

[13/] Section 309(j)(6)(C) recognizes this reclamation power embodied in Section 304 by clarifying that the Commission continues to have authority to "reclaim spectrum licenses."

use the spectrum in the manner described by the license. The transaction is clearly contractual in nature, and it is equally clear that an attempt to take back the license following payment of the consideration would amount to an actionable breach.[14] See Sun Oil Corp. v. United States, 572 F.2d 786, 816-17 (Ct. Cl. 1978) (breach of contract concerning oil exploration on Outer Continental Shelf); Conoco Inc. v. United States, 35 Fed. Cl. 309, 334 (1996) (material breach of OCS lease where United States unilaterally changed fundamental terms through subsequent legislation).[15] Such an action would be analogous to the situation in United States v. Winstar Corp., 116 S. Ct. 2432 (1996), in which the Federal Savings and Loan Insurance Corporation promised specific favorable regulatory treatment to certain thrifts in return for hundreds of millions of dollars in valuable consideration, only to withdraw the promises after the passage of the Financial Institutions Reform, Recovery, and Enforcement Act. The government's exposure for its breach in Winstar has been estimated at over $20 billion. Revocation of a PCS license bought at auction would present an easier case for breach in all relevant aspects.[16]

---

[14] Note that the rights conveyed by the auction sale are wholly separate from those conveyed by the license itself. In essence, the sale conveys a right to a license -- whatever rights such a license may embody. Section 309(j)'s admonition that an auctioned license confers the same rights as any other, see 47 U.S.C. § 309(j)(6)(D), does not mean that an auction conveys no right to receive the license.

[15] See also, Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 703 (1949) (noting that where government agent failed to deliver on a sales contract, plaintiff had an action for breach of contract in the Court of Claims); Lynch v. United States, 292 U.S. 571, 579 (1934) (Brandeis, J.) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals").

[16] There could be, for example, no serious argument that the revocation of a single license was a "public and general act" within the meaning of the sovereign act doctrine. Compare Winstar, 116 S. Ct. at 2463-69 (plurality opinion).

Sprint Spectrum would be entitled to money damages for any such breach, electing remedies arising from its restitution interest (the amount paid for the license), its reliance interest (out-of-pocket expenses incurred in building out its network in Miami), and its expectations (lost profits from the Miami license). See generally Restatement, Second, of Contracts §§ 345, 347.[17] The total price tag for any breach of the auction contract would thus be measured in hundreds of millions of dollars. Such costs would necessarily dwarf any disadvantages to giving QUALCOMM an unassigned license in another service area, such as the Phoenix BTA.

B. The license itself is a regulatory contract, and revocation other than according to the license's terms amounts to a breach.

The license itself is also a contract, must like the charters and franchises that frequently appeared in public contracts litigation during the 19th Century. See, e.g., Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 643-44 (1819); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 558 (1837) (McLean, J., concurring); The Binghamton Bridge, 70 U.S. (3 Wall.) 51, 73-74 (1865).[18] Under that contract, Sprint

---

[17] See also Uniform Commercial Code § 2-715(2) ("Consequential damages resulting from the seller's breach include . . . any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise"). The Commission, of course, is well aware of Sprint Spectrum's need for a license in Miami, as well as the uses to which the license will be put. And while it may be possible for Sprint Spectrum to "cover" through roaming agreements with other carriers, or through purchase of another Miami license from an incumbent, those courses would each involve major capital outlays.

[18] See generally J. Gregory Sidak and Daniel F. Spulber, "Deregulatory Takings and Breach of the Regulatory Contract," 71 N.Y.U. L. Rev. 851, 890-906 (1996) (discussing 19th Century cases finding a regulatory contract based on franchises and charters). Professors Sidak and Spulber have argued more broadly that the regulatory relationship in general (continued...)

Spectrum agreed to build out its network, provide service, and behave in accordance with certain other conditions; the FCC agreed, correspondingly, to allow Sprint Spectrum to operate its business for the term of the license so long as the conditions were adhered to, and to provide Sprint Spectrum with a high expectancy of renewal. Complete revocation of Sprint Spectrum's license before the end of the license term, for reasons that have nothing to do with the terms of license or with Sprint Spectrum's conduct, would clearly amount to a breach of this contract.

C. The license vests Sprint Spectrum and PrimeCo with property interests that cannot be taken without just compensation.

Whether or not a PCS license is "property" for all purposes, see FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 475 (1940), it clearly conveys a variety of legally protected interests.[19/] As Sprint Spectrum's massive build-out expenditures in

---

[18/](...continued)
amounts to a regulatory contract, and have recently filed comments in the Commission's Access Charge proceeding arguing that the Commission has a regulatory contract with local exchange carriers that guarantees them the right to recover their historical costs. See Affidavit of J. Gregory Sidak and Daniel F. Spulber, filed in CC Docket No. 96-262 (Jan. 29, 1997); Reply Affidavit of J. Gregory Sidak and Daniel F. Spulber, filed in CC Docket No. 96-262 (Feb. 14, 1997). Sprint Spectrum does not agree that a regulatory contract can be found outside the context of an express license -- especially where the service provider, such as a Local Exchange Carrier, is not within the Commission's licensing authority at all. Nor does Sprint Spectrum accept Professors Sidak's and Spulber's extension of the regulatory contract to cover specifics such as the measure of cost recovery. But there can be no dispute that a license is a contract that guarantees, at a minimum, the right to operate in accordance with the license terms.

[19/] Despite Sanders Brothers's categorical statement that "[t]he policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license," id., the actual language of the Communications Act is more nuanced. Section 301 of the Act distinguishes between "ownership" of "the channels of radio transmission" -- which cannot be conferred to private parties -- and rights to "use . . . such channels . . . for (continued...)

Miami make plain, a PCS license embodies substantial "investment-backed expectations." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Such a license conveys, moreover, traditionally protected interests such as a right to exclude, see Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979), and an expectancy of renewal, see Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474-75 (1973). Most important, such a license clearly conveys a right to use the spectrum for the duration of the license term, so long as the license conditions -- none of which are implicated here -- are met.[20/] Revocation of the license in these circumstances, for grounds not contemplated by 47 U.S.C. § 312(a), would thus amount to a per se taking of Sprint Spectrum's entire interest in the license. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (regulation eliminating the entire value of a property interest is per se taking unless the original grant incorporated the limitation at issue).[21/]

[19/](...continued)
limited periods of time," which can be so conferred. And, as noted previously, the same section goes on to state that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." Nothing in the Communications Act thus precludes the recognition of property interests specifically created by the "terms, conditions, and periods of the license" itself. Moreover, Sanders Brothers did not consider a regime where licenses were sold to the highest bidder. In any event, whether a license conveys property interests protected by the Takings Clause is ultimately determined not by the Communications Act, but by federal constitutional law. See Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978).

[20/] Disregard of these property interests would substantially undermine the Commission's market-oriented policies. As the Commission's own economists have recognized, that "substantial replication in the spectrum context of the freedoms inherent in property rights will allow competition to function more effectively, much as it does in those sectors of the economy where the basic inputs are privately owned." Rosston & Steinberg, supra, at *29.

[21/] Moveover, revocation of Sprint Spectrum's license would also result in a taking of Sprint Spectrum's contract rights. See Lynch, 292 U.S. at 579 ("Valid contracts are property. . . . (continued...)

Accordingly, if the Commission were to divest Sprint Spectrum of its license, Sprint Spectrum would be entitled to compensation for the full market value of the interest taken.[22] "[T]his value is normally to be ascertained from 'what a willing buyer would pay in cash to a willing seller.'" Almota, 409 U.S. at 474 (quoting United States v. Miller, 317 U.S. 369, 374 (1943)). The Commission would thus have to pay Sprint Spectrum the full value of its Miami business, including the purchase price of the license, the value of Sprint Spectrum's physical facilities in the region, as well as the expected future income stream from the license (including Sprint Spectrum's expectancy of renewal). Moreover, Sprint Spectrum would also have a claim for any diminution in the value of its national network arising from the loss of nationwide coverage.[23] At the end of the day, Sprint Spectrum would be entitled "to be put in the same position monetarily as [it] would have occupied if [its] property had not been taken." Almota, 409 U.S. at 474 (quoting United States v. Reynolds, 397 U.S. 14, 16 (1970)).

---

[21](...continued)
Rights against the United States arising out of a contract with it are protected by the Fifth Amendment").

[22] See, e.g., United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) ("[J]ust compensation normally is to be measured by 'the market value of the property at the time of the taking contemporaneously paid in money'") (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

[23] Cf. United States v. 47.14 Acres of Land, More or Less, 674 F.2d 722, 725 (8th Cir. 1982) ("The proper measure of just compensation when there is a taking of part of a parcel of land is the difference between the fair and reasonable market value of the parcel immediately before the taking and the fair and reasonable market value of the remainder").